
No. 3546.

IN EQUITY.

In the
United States
Circuit Court of Appeals
For the Ninth Circuit

THE WASHINGTON WATER POW-
ER COMPANY, a Corporation,
Appellant,

VS.

KOOTENAI COUNTY, a Municipal
Corporation, W. A. THOMAS, as
Treasurer and Ex-Officio Tax Col-
lector of Kootenai County, Idaho,
and C. O. SOWDER, Clerk of the
District Court and Ex-Officio Audi-
tor and Recorder of Kootenai
County, Idaho, and C. O. SOWDER,
and W. A. THOMAS, Individuals,
Appellees.

Petition For Rehearing

Upon Appeal From the United States District Court
For the District of Idaho, Northern
Division.

BERT A. REED,
C. H. POTTS,
N. D. WERNETTE,
Solicitors for Appellees.

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vs.

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Appellees.

Petition For Rehearing

The appellees respectfully petition for a rehearing, and for a modification of the decision and judgment rendered by the Honorable Circuit Court of Appeals, on February 7th, 1921, upon the following grounds:

First: The Honorable Circuit Court of Appeals erred in holding that no penalty is recoverable.

Second: The Honorable Circuit Court of Appeals misconstrued or overlooked the facts disclosed by the record, in holding that the tender made by appellant was sufficient to cover the taxes which should have been paid upon the property of appellant, if the Board of Equalization had proceeded consistently with relation to valuation put upon other like property.

After stating the rule of law applicable to the question of penalties in the following language:

“Under these statutes, one liable to pay taxes, and who makes a tender of an amount insufficient to cover the amount of the taxes lawfully assessed, becomes liable for all penalties and interest upon any sum found to be due.”

the Honorable Court then stated:

“It would appear from the allegations of the complaint that the tender made by the appellant was sufficient to cover taxes which should have been paid upon the property of appellant, if the Board of Equalization had proceeded consistently with relation to valuation put upon other like property. Under such circumstances no penalty is recoverable.”

The Honorable Court must have overlooked the fact that in its Amended Complaint, the appellant alleged that it tendered the sum of \$23,080.84, the same being fifty-five per cent of the taxes extended against its property in Kootenai County, (Record p. 30) and that the total amount of the taxes claimed by the County (exclusive of penalties) is \$41,965.16. (Record p. 32)

Appellant made its tender on a basis of fifty-five per cent, of an actual valuation claimed by it of \$2,470,439, while both the District Court and this Honorable Court have found that

the actual valuation of appellant's property was \$3,620,500. (Record p. 80) This leaves a difference of \$1,150,061 in the actual valuation of the appellant's property, upon which it did not make any tender or offer to pay any taxes.

As the actual valuation of the appellant's property was \$3,620,500, the valuation for assessment purposes under the opinion of this Honorable Court, viz., fifty per cent of the full cash value, was \$1,810,250.

Appellant's property was assessed by the State Board of Equalization at \$2,750,000, or approximately thirty-three and a third per cent more than it should have been assessed.

In other words, under the decision of this Honorable Court, appellant's property should have been assessed by the State Board of Equalization at fifty per cent of \$3,620,500, its actual value, or the sum of \$1,810,250.

The amount at which it should have been assessed, viz., \$1,810,250 is two-thirds of the amount at which it was assessed, viz, \$2,750,000.

Consequently appellant should have tendered two-thirds of the taxes assessed against it, while it only tendered fifty-five per cent thereof.

Appellant should have tendered approximately \$28,000, constituting two-thirds of the taxes assessed against it, viz., \$41,965.16, but in fact according to the allegations of the complaint, it actually tendered only \$23,080.84, and was therefore approximately \$5,000 short in its tender.

The rule of law announced by this Honorable Court in the opinion, is that a tender of an amount insufficient to cover the

amount of the taxes lawfully assessed, renders the taxpayer liable for all penalties and interest upon any sum found to be due.

Appellant made a tender of an amount which was approximately \$5,000 insufficient to cover the amount of the taxes lawfully assessed, and it therefore became liable for all penalties and interest upon the amount found to be due.

This is not a case where there is only a slight discrepancy between the amount of the tender and the amount found to be due, nor where the taxpayer might have been mistaken as to the amount which he should have tendered.

The insufficiency of the tender was due solely to the fact that the appellant claimed an actual valuation on its property of \$2,470,439, in the face of the findings of the Public Utilities Commission, which it submitted to the State Board of Equalization, and in which both the District Court and this Honorable Court have held that the finding as to valuation was \$3,620,500.

If the Board of Equalization had proceeded consistently with relation to valuation put upon other like property in the assessment of appellant's property, it would have assessed it at fifty per cent of an actual value of \$3,620,500, or an assessed valuation of \$1,810,250. Plaintiff's taxes on such valuation would have been approximately \$28,000, and it was its duty to tender that amount, rather than the sum of \$23,080.84 which it did tender. Having failed to make a tender of a sufficient amount to pay the taxes it was justly liable to pay,

it became liable for all penalties and interest upon the sum found to be due.

We respectfully submit that a rehearing should be granted or that the judgment and decision should be modified, to correct this manifest error.

Respectfully submitted,

BERT A. REED,

C. H. POTTS,

N. D. WERNETTE,

Solicitors for Appellees.

CERTIFICATE OF COUNSEL.

The undersigned, counsel for appellees and solicitors of record in the above entitled action, do hereby certify that they have read the within Petition for Rehearing, and know the contents thereof, and that in their judgment, and the judgment of each of them, the said Petition for Rehearing is well founded on the grounds therein stated, and that it is not interposed for delay.

Dated this 28th day of February, A. D., 1921.

BERT A. REED,

C. H. POTTS,

N. D. WERNETTE,

Solicitors for Appellees.

